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IN THE

United States Supreme Court

OCTOBER TERM, 1954.

No. [redacted]25

THE LIQUID CARBONIC CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF ON THE MERITS.

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INDEX.

	PAGE
THE OPINIONS BELOW	2
JURISDICTIONAL GROUNDS	2
STATUTORY PROVISIONS	4
QUESTIONS PRESENTED	4
STATEMENT OF CASE	5
SUMMARY OF ARGUMENT	8
ARGUMENT:	
The entry of the injunctive order was unwarranted by the provisions of the final decree or by any interpretation thereof	9
The injunctive order materially changes the consent decree and violates the guaranty of due process	12
CONCLUSION	20

CASES AND STATUTES.

Ford Motor Co. v. *U. S.*, 335 U. S. 303	16
Hughes v. *U. S.*, 342 U. S. 353	3, 12, 15
Lawlor v. *National Screen Service Corp.*, 349 U. S. 322	12, 15
Missouri-Kansas Pipe Line v. *U. S.*, 312 U. S. 502	3
Swift & Co. v. *U. S.*, 276 U. S. 311	3
U. S. v. *International Building Co.*, 345 U. S. 502	14, 15
U. S. v. *International Harvester Co.*, 274 U. S. 693	12, 19
U. S. v. *Swift & Co.*, 286 U. S. 106	16, 20
U. S. Constitution, Fifth Amendment	4

IN THE

United States Supreme Court

OCTOBER TERM, 1954.

No. 477.

THE LIQUID CARBONIC CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF ON THE MERITS.

Appeal from a final order (R 96) of the United States District Court for the Southern District of New York (RAYFIEL, D. J.), which modified a final decree (R 73) entered on consent in an action brought pursuant to Section 4 of the Act of Congress of July 2, 1890 (C. 647, 26 Stat. 209; 15 USC §4) for alleged violations of Sections 1 and 2 of said Act (*id.* 15 USC §§1, 2). The final order enjoined appellant from producing, storing or distributing carbon dioxide and dry ice at its plants in Long Island City, New York[1] and Indianapolis, Indiana.

[1] Subsequent to the entry of this Court's order of February 14, 1955, noting probable jurisdiction, appellant's Long Island City plant was sold and any question involving a disposition of said plant is, therefore, moot.

The Opinions Below.

No opinion was delivered upon the rendering of the consent decree (R 73).

Thereafter appellee moved for an order "carrying out said judgment" as ordered therein "by directing [appellant] to dispose of said plants" [though the notice of motion admitted that there could be no sale in the manner provided for in the consent decree] (R 107).

This motion was "denied, without prejudice to a renewal thereof upon a proper showing of good cause" but, with the mandate that "Liquid is enjoined from the production at either of said plants of carbon dioxide and/or dry ice" (R 103). The opinion, dated May 4, 1954 (R 98) is reported in 121 F. Supp. 141. No order was entered on that decision.

Reargument was thereafter granted on appellant's motion (R 111) on the ground that the matter of injunctive restrictions "was not submitted to the Court at the hearing" (R 104-5). After reargument the District Court rendered the opinion, adhering to its previous one, and broadening the injunction (see p. 7, *infra*), reported in 123 F. Supp. 653. The final order (R 96) from which this appeal was taken was entered September 20, 1954. No separate findings of fact or conclusions of law have been made by the Court below.

No opinions except those noted above, have been rendered in this cause (there has been no companion case) to which reference is necessary on this appeal.

Jurisdictional Grounds.

Appellant has invoked the Court's jurisdiction upon the following grounds:

(i) The action, in which the final order appealed from was entered, was instituted by the appellee against appel-

lant and three other corporations to prevent and restrain alleged violations of Sections 1 and 2 of the Act of July 2, 1890 (15 U. S. C., §§1 and 2), in pursuance of Section 4 of the Act of Congress of July 2, 1890 (Title 15, U. S. C., §4, C. 647, 26 Stat. 209).

(ii) This appeal is from a final order entered below on September 20, 1954, on motion of the appellee, and over the opposition of the appellant, modifying and enlarging upon the final judgment herein which had been entered on consent on March 7, 1952. No order respecting a rehearing of the order appealed from has been made. Notice of Appeal to this Court was served and filed in the United States District Court for the Eastern District of New York on October 27, 1954.

(iii) Appellant believes that the provisions which confer on this Court jurisdiction of this Appeal are found in Title 15 U. S. C., §29 (Feb. 11, 1903, c. 544, §2, 32 Stat. 823; Mar. 3, 1911, c. 231, 36 Stat. 1167; June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, §17, 62 Stat. 989).

(iv) Cases which appellant believes sustain this Court's jurisdiction of this appeal are:

Hughes v. *United States,* 342 U. S. 353;
Missouri-Kansas Pipe Line Co. v. *United States,* 312 U. S. 502;
Swift & Company v. *United States,* 276 U. S. 311.

In its order of February 14, 1955, this Court noted probable jurisdiction and placed this cause on its summary calendar.

Statutory Provisions.

No statutory provision, treaty or regulation is directly involved in this case. However, the 5th Amendment to the United States Constitution[2] is directly involved, in that the District Court's order prohibiting the appellant from the use of its two plants, was made without a hearing, or taking testimony, and over appellant's protests and thereby deprived appellant of its property without due process of law.

The consent decree upon which the District Court sought to base its order, was entered "without trial or adjudication of any issue of fact or law" and upon appellant's answer "denying the substantial allegations" of the complaint (R 60). There is and can be no claim that appellant's consent constituted an admission of the factual allegations or legal conclusions contained in the complaint or that such allegations or conclusions have any bearing on the final decree or the modification thereof. Accordingly, the order cannot be justified on any basis that appellant has violated the Sherman Act, 15 USC §1, *et seq.*

The Questions Presented.

The questions presented for review on this appeal are as follows:

1. Whether the District Court erred in enjoining appellant from producing, storing or distributing carbon dioxide and dry ice or either of them, at its plants at Long Island City, New York [see Note (1), *supra*] and Indianapolis, Indiana.

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(2) "• • • nor shall any person • • • be deprived of life, liberty, or property without due process of law • • •" (U. S. Const., Amend. V).

2. Whether the District Court had the power, without holding any hearing, taking any testimony or making any findings, to make the order appealed from granting injunctive relief.

3. Whether the District Court in making the order appealed from exceeded the jurisdiction reserved in the consent decree.

4. Whether the order entered herein, without appellant's consent and without a hearing or findings and enjoining the use of appellant's property, deprives appellant of its property without due process of law or constitutes confiscation thereof.

5. Whether, in any event, the District Court could properly have set aside or opened the consent decree and make the order now under appeal.

Statement of Case.

The complaint (R 46) charges that appellant and others engaged in an illegal combination and conspiracy to restrain trade and monopolize interstate commerce in connection with the manufacture, distribution and sale of carbon dioxide and dry ice (R 50). The appellant, and each other defendant, filed an answer (R 60) denying all the material allegations of the complaint. Thereafter, and without a trial or hearing, final judgment was entered on March 7, 1952, on the consent of appellant, the appellee and all other defendants (R 95). The terms of said decree have, appellant submits, been fully complied with. Appellee, however, maintains, and has, in part, been sustained by the District Court in the order appealed from (R 96), that the conditions under which appellant was to dispose of certain of its

plants may be ignored and that appellant may be forced to rid itself of said plants or the use thereof in a manner and for a purpose not provided for by the consent decree.

Under the terms of subsections (1) to (5) of Section IX (E) of the consent decree (R 83-4) appellant was required, within one year from the date of the decree, to sell two of its plants located respectively at Long Island City, New York, and Indianapolis, Indiana, but subject to the terms and conditions there set forth, viz; the plants were to be disposed of "as complete units," and as going concerns; the sale was to be made only to persons who intended and undertook to operate the plants for the manufacture of the same products (that is, competitors or potential competitors of appellant); the sale was to be made within one year, or an extended period if it should appear that "there may be persons who have an interest in purchasing the said plants," by a trustee, acting as an officer of the Court, and at a price to be "determined by the Court, having due regard" to appraised value thereof (R 83). In the interim, pending such sale, appellant was required to maintain and operate said plants at full capacity (R 84).

Appellant did *not* consent, and the decree did *not* provide that the plants should be *otherwise sold or their use discontinued.* The disposal of the plants and the consequent discontinuance of their use by appellant were expressly made contingent upon the conditions outlined above.

A trustee was appointed and efforts were made to procure a purchaser meeting the requirements set forth in the decree during the initial period of one year, as extended. The trustee's inability to dispose of the plants in the manner prescribed having been conceded, his appointment was terminated in all respects on November 2, 1953 (R 99).

Thereafter, and by notice of motion filed December 28, 1953, (R 107) the appellee moved, purportedly under the District Court's reservation of jurisdiction (Section XIII of the final judgment—R 90),[3] for an order "carrying out said judgment" by directing appellant "to dispose of said plants as ordered and directed by Section IX(E)(1) of said final judgment," and for other, unspecified relief (R 108).[4]

After argument of the motion, the District Court held:

> "The Government's [appellee's] motion for an order directing Liquid [appellant] to dispose of the Long Island City and Indianapolis plants is denied, without prejudice to a renewal thereof upon a proper showing of good cause therefor, and Liquid is enjoined from the production at either of said plants of carbon dioxide and/or dry ice" (R 103).

Thereafter appellant moved for reargument (R 111) and after reargument, the District Court not only adhered to its original decision in all respects but further enlarged the injunctive relief against appellant so as to enjoin appellant not only "from using the Long Island City and Indianapolis plants for the production," but also for the "storage or distribution of carbon dioxide and/or dry ice" (R 106).[4]

In short, appellant was deprived of any possible gainful use of these plants in its business, the business conducted

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[3] "Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or amendment of any of the provisions thereof, the enforcement of compliance therewith and the punishment of violations thereof."

[4] The government did not seek an injunction restraining appellant's use of the plants. Indeed, its counsel informed the Court, which *sua sponte* raised the question, that an injunction might constitute a modification of the consent decree (R 5, 6).

there was to be destroyed, and the sales value of the plants reduced to a minimum, all over the opposition of the appellant and in the absence of proof that appellant had violated any law.

Summary of Argument.

Appellant's argument set forth herein may be summarized as follows:

The consent decree contains no provision for, or consent to enjoining appellant's use of its plants. No such provision may properly be engrafted onto the decree by interpretation of appellant's consent to limited divestiture. An enlargement of the decree to encompass the injunctive relief constitutes a substantial modification of the decree. The order like the consent decree was entered "without trial or adjudication of any issue of fact," without the introduction of any evidence and without making findings with respect thereto, and despite the express limitations upon appellant's consent to particular relief only (R 73). Its effect, in denying any use of the plants to the appellant in its business was completely to change the nature and object of the relief (a) from a sale of a going plant for use by a competitor to the sale of an abandoned plant to anyone who would take it, (b) from a sale at a reasonable value to an indirectly forced sale at a sacrifice price, (c) and from a sale that might be expected to increase competition to an abandonment of business by appellant, which would have the effect of lessening competition in the areas affected. Neither the District Court's reserved power nor its inherent power can supply jurisdiction for the compulsory prohibition thrust upon appellant. The relief granted below, therefore, deprives appellant of the use of its plants without due process of law.

ARGUMENT.

The entry of the injunctive order was unwarranted by the provisions of the final decree or by any interpretation thereof.

The final decree below entered on the consent of the parties (R 73) contains no express provision prohibiting appellant's full use of its plants. Indeed, the contrary appears in Section IX(E)(4) (R 84), wherein it is provided that appellant "shall take such steps as are necessary to maintain said plants, until the time of disposal thereof by the Trustee, at the defendant's (appellant's) best standards of operating performance applicable to said plants for the manufacture of CO_2 and (in the case of the existing plant located at Indianapolis, Indiana) dry ice. Pending such disposal, defendant Liquid shall not permit said plants to be diminished in capacity or turned to uses other than the manufacture of CO_2 or dry ice."

Attention is directed to the precise limitations contained in the foregoing provision respecting disposal of the plants, as confined to "disposal thereof by the Trustee * * *." There is no claim that the Trustee still functions or that the period within which he was to effect a sale has not fully expired. His efforts to sell in accordance with the consent decree had established that there was no competition, present or potential, that would be fostered by a sale of the plants. Accordingly, support for full divestiture by sale of the plants or partial divestiture by a compulsory prohibition against their use, must be found—if it exist at all—elsewhere in Section IX of the decree, which contains the *only* provisions that discuss in any manner the two plants under consideration here.

Section (E) in addition to the provisions of subsection (4) just discussed, has four other subsections. (R 83-84.) Of these, subsection (5) has no possible bearing on this dispute. Subsection (1) contains specific reference to the one year limitation referred to above, i.e., "within one year from the date of entry of this Final Judgment, defendant Liquid shall, pursuant to the terms and conditions of this subsection (E) of this Section IX, dispose of, as complete units, its existing plants located at Long Island City, New York, and Indianapolis, Indiana." Further reference to the one year period is contained in subsection (2), which introduces the sale by Trustee concept, thus, "disposal of said plants shall be effected through a trustee or trustees (hereinafter referred to as 'The Trustee') appointed by the Court forthwith after entry of this Final Judgment. The term of appointment of The Trustee shall be one year. The Court may extend such term upon a showing that there may be persons who have an interest in purchasing the said plants. The Trustee * * * shall have full powers to bring about the prompt and expeditious disposal of said plants in accordance with the terms and conditions of this subsection (E) * * *."[5] Subsection (3) contains provisions for an appraisal of the plants by a Court appointee, to assure appellant a fair return on divestiture by sale and also contains restrictions respecting the prospective purchasers, i.e., "disposal of said plants by The Trustee shall be restricted to persons who intend to operate said plants in the manufacture of CO_2 or dry ice or both, and who file

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[5] Clearly it was within the contemplation of the parties in consenting to the decree that such limited period should suffice to demonstrate whether there *were* any persons in the competitive field who "have an interest in purchasing" the plants under the terms of the decree.

with the court an undertaking so to do."[6] As stated at the outset, there is no divestiture provision in Section IX(E)(1) through (5) (R 83-84) which does not limit divestiture, first, to a period of time, namely, one year from the entry of the decree, (sub. 1), secondly, to disposition during such period, unless extended for good cause, by a court appointed Trustee, (sub. 2), thirdly, to disposition at a price based on a value fixed by a court appointed appraiser (sub. 3) and finally, to persons meeting the specific qualifications, namely, those having an established intent to operate the plants in the manufacture of CO_2 or dry ice or both (sub. 3).

Express provisions prohibiting appellant from operating its plants being lacking, it remains to be seen whether any such provision is present by construction or interpretation. The decree itself, as pointed out above, expressly required continuance of the plants at appellant's "best standards" (sub. 4; R 84). Careful reading of the language contained in Section (E) leaves nothing to the imagination or to interpretation. The language is succinct, clear and direct. A more carefully prepared scheme for the accomplishment of divestiture within its framework could hardly be envisioned. No ambiguous phrases, no incompleted concepts, no difficult passages are encountered. On the contrary there is every evidence that the minds of appellant and appellee met with the concurrence of the District Court on formulation of a plan designed to effect an increase in competition, which appellee considered to be desirable, by sale to a competitor within the period and in the manner specifically provided in the section; nothing else was con-

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[6] Yet, now the District Court has in effect changed this as though it read "disposal of said plants shall be made by the appellant to anyone who wants them for any purpose or at any price, or said plants shall be permitted to stand idle and vacant."

templated or desired by the parties.[7] Accordingly, resort by the District Court (R 102) to the allegations, charges and "general purpose" and "objectives" of the complaint —all of the allegations of which were expressly denied by appellant—was unnecessary and improper. The consent decree was not, nor could it be, determinative of any issue. *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322; decided June 6, 1955.

"[T]he parties and the District Court provided their own detailed plan * * *" (*Hughes* v. *U. S.*, 342 U. S. at 357) in the consent decree, and it now remains to be seen whether changes therein could be made in disregard of the requirement of due process, i.e., hearings, evidence and findings, absence of which has been specifically condemned by this Court in *Hughes* v. *U. S., supra.*

The injunctive order materially changes the consent decree and violates the guaranty of due process.

The District Court did not take testimony or hold hearings when the consent decree was made (R 18) nor upon the entry of the modification order. This alone, under the doctrine of *U. S.* v. *Hughes, supra,* would be a sufficient defect on which to strike the order. The discussions before the Court at or prior to the entry of the consent decree and the argument and re-argument of the motion resulting in the order appealed from (R 3-45) cannot and do not constitute a substitute for the "substantial evidence" prescribed in *U. S.* v. *International Harvester Co.* (274 U. S. 693 at p. 703), where it was held that anything short of common law proof "violates the fundamental rules of evidence

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[7] Appellee contended at and before entry of decree that the plants would be purchased by a CO_2 producer. That contention was vigorously disputed by appellant which, however, was willing to test by trial the truth of the government's assertion (R 15).

entitling the parties to a trial of issues of fact, not upon hearsay, but upon the testimony of persons having first hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination" (p. 703).

Concededly, no attempt was made by the District Court at any time to comply with the foregoing rule. The consent decree itself (R 73) expressly states that it was entered "before the taking of any testimony and without trial and adjudication of any issue of fact or law • • •." No testimony or other proof was or could have been properly produced thereat, since the litigation has been disposed of *on consent* and not *by contest.* Indeed, no evidence was at any time produced (R 18).

Despite the Court's statement that findings had not been made and that the allegations of the complaint were denied by appellant (R 102), the Court below purported to *determine* the "general purpose" of the complaint (denied *in toto* by appellant) and stated:

> • • • "While there were no findings of fact, and the chief substantive allegations of the complaint were denied by the defendants, nevertheless the general purpose of the complaint, the objectives sought to be achieved thereby, and the general scope and purpose of the decree may properly be considered in determining the intent of the parties in giving their consent thereto" • • • (R 102).

Once the fundamental concept that appellant conceded nothing contained in the complaint—including its "general purpose"—or in the final decree *not expressly and carefully* set forth therein as consented to, was lost sight of, the Court proceeded to adjudicate—without findings or any hearing or taking any proof—the new relief it said to be appropriate, in these words:

> "Of what avail would the decree herein, so far as it applies to the Long Island City and Indianapolis plants, be if its effectiveness depended on such a fortuitous circumstance as the success of the Court-appointed Trustee in effecting the sale thereof within the moderate period of time and under the somewhat restricted terms and conditions provided in the decree? Such a holding would be unrealistic, repugnant to the very purpose of the anti-trust statutes, and tend to nullify a basic and integral part of the decree; it would make the divestiture provisions thereof meaningless" (R 102).

The foregoing quotations clearly reveal the error into which the District Court fell when it became unmindful of the nature and extent of the consent decree and sought to rewrite that decree over the protest of the appellant.

Accordingly, the Court below duplicated the error which this Court, in *U. S.* v. *International Building Co.*, 345 U. S. 502, condemned in these words:

> "We conclude that the decisions entered by the Tax Court for the years 1933, 1938, and 1939 were only a *pro forma* acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. There is no showing either in the record or by extrinsic evidence (see *Russell* v. *Place*, 94 U. S. 606, 608) that the issues raised by the pleadings were submitted to the Tax Court for determination or determined by the court. They may or may not have been agreed upon by the parties. Perhaps as the Court of Appeals inferred, the parties did agree on the basis for depreciation. Perhaps the settlement was made for a different reason, for some exigency arising out of the bankruptcy proceeding. As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration" (p. 505).

The consent decree, although made without findings or testimony, was and is, *res judicata* between appellee and appellant under familiar principles. It bars a new suit upon the same cause of action, or upon claims which arose prior to the judgment and which could have been sued on in the same suit. *Lawlor* v. *National Screen Services Corp., supra,* 349 U. S. 322; *U. S.* v. *International Building Co., supra.* On the other hand, it does not constitute a finding on any issue,— "such as the legality of the exclusive license agreements or their effect on petitioners' business" (in *Lawlor's* case) or the violation by appellant of the anti-monopoly laws (in this case), which might arise in connection with another cause of action. Clearly the Government could not have obtained the relief granted by the order appealed from in a new action; there is no pretense of any subsequent or new anti-trust violation *(ibid).* Likewise there is no claim of any fraud or other ground for setting aside the consent decree, nor did the court attempt to do so. Yet the District Court has attempted to compel divestiture, beyond and outside of the consent of the parties and of the judgment entered thereon, though there has not been, and cannot now be, any determination that appellant has violated the anti-monopoly laws in the respects set forth in the complaint herein. Manifestly, in the absence of such determination compulsory divestiture is improper.

Once a consent decree is entered, the power to modify or change it—even if disguised under an attempted "interpretation"—must not only be based upon a hearing, and common law proof, but in no event can there be a substantial variation in the *quantum* or nature of the relief covered by the consent. These requirements are not avoided by a reservation of power or jurisdiction over the parties in such a decree. (*Hughes* v. *U. S., supra.*)

In the *Hughes* case, the Government relied upon a similar reservation as well as upon the inherent power of the Court (342 U. S. 353). Nevertheless, this Court held that the attempted modification was erroneous and an abuse of any inherent power in the Court.

Even where changing circumstances are alleged to require a modification of a consent decree (*cf. U. S.* v. *Swift & Co.*, 286 U. S. 106; at p. 114), the "burden of showing good cause why a court of equity should grant relief from an undertaking well understood and carefully formulated, • • • " is upon the Government which seeks such relief. *Ford Motor Co.* v. *U. S.*, 335 U. S. 303, at page 322. No serious contention can be made that appellee here made any showing of changed conditions or sustained the burden of common law proof required to effect a modification of the decree. Indeed, it is apparent that there has been no change in conditions since the consent decree was entered; the possible lack of buyers was within the contemplation of the parties [see Note (7) *supra*]. The Government was then willing to risk the chance that no sale, as agreed upon, could be made; the appellant was ready to take the chance that it could. Both obviously realized that if such a sale were not possible, there was no reason for appellant's disposing of its property.

There is [the District Court to the contrary notwithstanding (R 100)] no escape in the present case from the force of this Court's holding in the *Hughes* case, *supra*. There, as here, a divestiture such as provided for by consent decree was desired on the one hand and consented to on the other. In the *Hughes* case, it was agreed that Mr. Hughes should have the right to select one of two methods of divestiture, i.e., to dispose of any control over his stock (a) by sale, or (b) by deposit of the stock with a court-designated voting trustee (342 U. S. at 355). After Mr.

Hughes selected the latter method (deposit with the voting trustee until sale), the Government sought to compel Mr. Hughes to sell his stock. Without evidence or findings of fact, and over Hughes' protest, the District Court directed Mr. Hughes in summary fashion to sell his stock. This Court held that was error (342 U. S. at 358).

In the case at bar, the Government and appellant agreed upon a method by which it might be ascertained whether there was any potential competition which was impeded by existing conditions, and, if so, the means by which the freedom of competition might be increased, namely, a limited form of divestiture by a sale within a fixed period which could be enlarged if there were any possibility of a sale as there provided by a court appointed trustee at a reasonable price to a person who would qualify as a carbon dioxide producer. [Final Decree, Sec. IX; (R 83-84)].

The holding of the *Hughes* case applies *a fortiori* to the present one. There, it was agreed that in all events there should be a divestiture. Here, the agreement was that there should be a divestiture *only* in case certain conditions were complied with.

In the Court below, as in the *Hughes* case, the Government sought to force upon appellant a sale of its property in violation of its solemn agreement contained in the consent decree; here, any disposition of appellant's plants was limited as to time and adequacy of price, and was to be made only if a purchaser was found with the enumerated qualifications which would tend to enlarge competition. The District Court did not grant the entire relief requested by the Government, but it did prohibit appellant from in any way using its plants in its business (R 97-98). Thus, in effect, the District Court accomplished an even more stringent result than that produced in the *Hughes* case as indicated in the foregoing. In both there was an

enforced deprivation of property without consent, without evidence or findings of fact and over appellant's protest. In disapproving the action of the lower court in the *Hughes* case, this Court said:

> • • • "the parties and the District Court provided their own detailed plan to neutralize the evils from such ownership. Whatever justification there may be now or hereafter for new terms that require a sale of Hughes' stock, we think there is no fair support for reading that requirement into the language of section V. The District Court's order cannot be supported by reliance on such an interpretation. Consequently the court's command to sell the stock effected a substantial modification of the original decree" (p. 357).

This Court then concluded:

> • • • "Neither when the present order was considered nor when the original decree was entered were any findings of fact made to support an order of compulsory sale of Hughes' stock. As previously pointed out the consent of Hughes did not include consent to make him sell. At every stage Hughes objected to the order forcing sale of his stock without a hearing that included evidence and a judicial determination based on it.
>
> "In these circumstances we hold that it was error to enter an order forcing Hughes to sell his stock" (pp. 357-8).

Some years ago, when the question of the power and propriety involved in a district court's modification of a consent decree in an antitrust case was before it, this Court said that a modification of a consent decree so as to require the division of the International Harvester Company into separate corporations—on the ground that,

although the consent decree did not specifically so provide, certain later developments required such conclusion in order to render effective the broad objectives of the decree—

> "would plainly be repugnant to the agreement approved by the court and embodied in the decree, which has become binding upon all parties, and upon which the International Company has, in the exercise of good faith, been entitled to rely" (*U. S.* v. *International Harvester Co., supra,* 274 U. S. 693 at p. 703).

Here there have been no later developments but simply a demonstration that there were and are no competitors or potential competitors willing and able to purchase appellant's plants.

It is axiomatic that if appellant was to be bound by its consent to a conditional and limited divestiture (as it was) that the Government must also be bound by its agreement thereto. It was obviously apparent to the District Judge that any compulsory sale under guise of enforcing the consent decree would violate appellant's constitutional rights. It was sought to avoid this by granting injunctive relief.

The consent to a partial divestiture was predicated upon and limited to the contingency that a competitor be found to purchase the property—an event which appellant had warned would not materialize, but on which the Government was prepared to take a chance (R 15). That was what the consent decree provided. The Government cannot now be heard to assert that, the condition precedent to any sale having failed, as appellant had warned it would, the court may, nevertheless, compel divestiture of a type and in a manner never contemplated. Constitutionally, the injunctive relief is equally objectionable and no less a deprivation of property without due process.

Having wisely or unwisely renounced such other rights of enforcement as it might have gained through successful litigation, the Government may not be heard to complain that the lesser remedy it acquired by consent is unsatisfactory. (Cf. *U. S.* v. *Swift & Co.*, 286 U. S. 106 at 119). What was solemnly adjudged as a final composition of this litigation may not be lightly undone at the Government's caprice. (*U. S.* v. *Swift & Co., idem* at p. 120).

The District Court erred in acting without due process. It cannot, in any event, or by further proceedings, set aside or open the consent decree, and make a new or different decree such as the Government sought and the Court in effect granted by the order now under appeal.

Conclusion.

The order of September 20, 1954, should be reversed and appellee's motion denied in all respects.

Respectfully submitted,

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	3
Summary of argument	8
Argument:	
The consent judgment obligated appellant to dispose of the two plants, even though the trustee could not sell them to purchasers who intended to operate them for the production of CO_2 or dry ice. The order of the district court was an appropriate means for carrying out this obligation	10
Conclusion	16

CITATIONS

Cases:

Felker v. *Southern Trust Co.*, 264 Fed. 798, certiorari denied, 254 U.S. 633	12
Hendrie v. *Lowmaster*, 152 F. 2d 83	12
Hughes v. *United States*, 342 U.S. 353	9, 15, 16
Pope v. *United States*, 323 U.S. 1	11
Swift & Co. v. *United States*, 276 U.S. 311	12
Union Pacific R. R. v. *Mason City &c. R. R.*, 222 U.S. 237	12
United States v. *Swift & Co.*, 286 U.S. 106	11
Vicksburg v. *Henson*, 231 U.S. 259	12

Statute:

Act of July 2, 1890, Sec. 4, 26 Stat. 29, 15 U.S.C. 4	3

Miscellaneous:

Note, *The Modification of Antitrust Decrees*, 63 Harv. L. Rev. 320	11

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 25

THE LIQUID CARBONIC CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion accompanied the antitrust consent judgment (R. 73-96) entered against appellant.[1] The two district court opinions (R. 98-103, 103-107) following argument and reargument of the Government's motion for an order "carrying out said judgment" against appellant are reported in 121 F. Supp. 141 and 123 F. Supp. 653.

[1] That judgment also ran against three other firms engaged in the same business as appellant, Air Reduction, Pure Carbonic and Wyandotte Chemicals.

JURISDICTION

The district court order from which this appeal is taken was entered on September 20, 1954 (R. 96). The notice of appeal was filed on October 27, 1954 (R. 112), and probable jurisdiction was noted on February 14, 1955 (R. 114). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 15 U.S.C. 29.

QUESTION PRESENTED

An antitrust consent judgment required appellant (a manufacturer of carbon dioxide and dry ice charged with monopolization and various restraints of trade) to dispose of two of its plants. One condition specified was that disposition should be made to prospective competitors. The judgment also provided that jurisdiction "is retained" to enter any further orders "necessary or appropriate for the construction or carrying out" of the judgment. Appellant was unable to sell the plants to other carbon dioxide or dry ice manufacturers. Shortly thereafter, the court, on the Government's motion, enjoined appellant from using the plants for the production, storage or distribution of carbon dioxide and/or dry ice, but left it free to use the plants for other purposes or to sell them. On this appeal from that order, the following questions are presented:

1. Whether, under all of the relevant circumstances, the district court reasonably interpreted

its judgment as having the overriding purpose of accomplishing divestiture of the plants.

2. If so, whether the order under review was a "necessary or appropriate" means of effectuating that purpose.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, 15 U.S.C. 4, known as the Sherman Act, provides in part as follows:

> Sec. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

On June 24, 1948, the United States filed a complaint (R. 46-59) charging that appellant and its principal competitors had violated Sections 1 and 2 of the Sherman Act by combining and conspiring to restrain and monopolize, by attempting to monopolize, and by monopolizing interstate commerce in carbon dioxide ("CO_2") and dry ice. The complaint alleged, among other things, that in 1928 appellant began a program "to eliminate competing manufacturers and distributors of CO_2 and dry ice by acquiring their assets, plants and prop-

erties * * * " (par. 12, R. 49). Appellant's answer (R. 60-70), though denying any antitrust violation, admitted acquisition of 17 producers and distributors of CO_2 or dry ice (who had properties in more than 16 cities, R. 63-64). The result, as the Government alleged and appellant admitted, was that appellant and Pure Carbonic, Inc. ("Pure"), named as a co-conspirator, were "the only companies in the United States having nationwide distribution of both CO_2 and dry ice" (R. 60).

On March 7, 1952, the district court entered a consent judgment against all of the defendants (R. 73-96). The judgment, in addition to granting other relief,[2] provided in Section IX (E) for divestiture of two of appellant's plants. Section IX (E) (1) provided that appellant, within one year from the date of entry of judgment, "shall, pursuant to the terms and conditions of this subsection (E) of this Section IX, dispose of, as complete units, its existing plants located at Long Island City, New York, and Indianapolis, Indiana * * *" (R. 83). IX (E) (2) provided that "disposal of said plants shall be effected through a trustee" appointed by the court for one year, and that the trustee's term might be extended "upon a showing that there may be persons interested in purchasing the said plants" (*ibid*). IX(E)(3) requires that disposal shall

[2] The judgment enjoined appellant from a number of restrictive practices (R. 76), prohibited it from acquiring any interest in any other CO_2 or dry ice producer or distributor in which any other defendant has any financial interest (R. 76-77), and required it, under some circumstances, to sell uncommitted CO_2 to all qualified distributors (R. 78-80).

be at such reasonable prices as the court shall determine and shall be restricted to "persons who intend to operate said plants in the manufacture of CO_2 or dry ice or both" (R. 83-84). IX(E)(4) requires appellant to maintain the plants, pending disposal by the trustee, at appellant's "best standards of operating performance applicable to said plants for the manufacture of CO_2 and * * * dry ice" (R. 84). Finally, under Section XIII, the court retained jurisdiction for the purpose of enabling any of the parties to apply to the court "at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or amendment of any of the provisions thereof, the enforcement of compliance therewith and the punishment of violations thereof" (R. 90-91).

In March 1952, a trustee was appointed for one year. His term was subsequently extended to June 1, 1953, as to the Long Island plant, and to November 3, 1953, as to the Indianapolis plant (R. 99). However, no purchaser offering a reasonable price and planning to use the plants for CO_2 or dry ice purposes was found. Accordingly, on November 3, 1953, the appointment terminated (*ibid.*).

Shortly thereafter, on December 28, 1953, the United States moved, pursuant to Section XIII of the judgment, for an order "carrying out said judgment" by directing appellant to dispose of its Indianapolis and Long Island plants "and for such other and further orders as may seem appropriate

and necessary to the Court" (R. 107-109). Following argument of this motion in January 1954 (R. 1-23), the court on May 4, 1954, rendered an opinion in which it concluded that it would not order appellant to dispose of the plants but would enjoin it from producing CO_2 or dry ice at either plant (R. 98-103).

The opinion declares (R. 102) that "the general purpose of the complaint, the objectives sought to be achieved thereby, and the general scope and purpose of the decree may properly be considered in determining the intent of the parties in giving their consent thereto."[3] Section IX(E), the court found, reflected "two purposes, (1) to divest Liquid of the plants in question, and (2) to attempt to effect the sale thereof to persons who would operate them in competition with Liquid" (R. 101). "[T]heir accomplishment would not only have reduced the monopolistic power and influence of Liquid charged in the complaint but would also have provided added competition, one of the objectives sought to be obtained" (*ibid.*). Appellant's interpretation—that the trustee's failure to effect sale on the precise terms and conditions specified in Section IX(E) resulted in a complete discharge of appellant's divestiture obligation—"would do violence," the court declared, "to the intent" of the judgment and "would have the effect of robbing

[3] The court had previously noted at the argument on the motion (R. 22): "I participated in the conferences leading up to the consent decree,, as you know, over a period of many, many months— * * *. Many, many hours were taken in discussing it."

the Sherman Act of much of its efficacy, and would probably lead again to the conditions which this action and the said Act were designed to prevent" (R. 102). The court also noted (*ibid.*) that an affidavit submitted by appellant's president in opposition to the Government's motion showed that it was appellant's "understanding that the effect of the decree would be to proscribe further production activities at the plants in question * * *." The trustee's failure to find a purchaser who would use the plants for the manufacture of CO_2 or dry ice thwarted achievement of the "two purposes" of the decree (R. 101). "[T]he next best result, reducing Liquid's productive influence, could be accomplished," the court concluded, "as effectively by enjoining further production by Liquid at the plants in question as it could by compelling the sale and disposal thereof, and without subjecting Liquid to the possible substantial loss which might result from a sale under unfavorable circumstances and conditions" (*ibid.*). Accordingly, based on its opinion of "the intent and understanding of Liquid in consenting to the Final Judgment herein * * *" (R. 102), the court enjoined appellant "from the production at either of said plants of carbon dioxide and/or dry ice" (R. 103).

Reargument was granted on appellant's plea that it had no opportunity to oppose the precise relief the court ordered. At reargument, the Government requested that the injunctive relief be broadened to bar appellant's use of the two plants, not only for dry ice "production" but also for its "storage

and/or distribution" (R. 106). Granting the Government's request, the court reiterated its view that the "intent" of the judgment was not limited to providing for only "conditional" divestment, as appellant contended (R. 106), and that its prior action was "consistent and in harmony with the consent judgment" (*ibid.*). The court pointed out (*ibid.*) that sale of the plants by the trustee would have imposed "an even greater burden" upon appellant than the injunction issued, "for it would have resulted not only in a discontinuance of operations by Liquid but also in the introduction of additional competition in the areas involved * * *." Failure to extend the injunctive relief to cover storage and distribution as well as production, the court stated, "would nullify, in part at least, the consent decree entered herein." Therefore, "in order to effectuate what [it] believe[d] to be the basic purpose of the decree" (*ibid.*), the court enjoined appellant "from producing or storing at or distributing from its Long Island City, New York and Indianapolis, Indiana plants carbon dioxide and/or dry ice * * *" (R. 97). From that order, dated September 20, 1954, this appeal is taken.

Since entry of the order, appellant has sold its Long Island plant, Therefore, so far as the order under review relates to that plant, the appeal, as appellant recognizes (Br. p. 1, n.), is moot.

SUMMARY OF ARGUMENT

The district judge, who had played an active and important part in the formulation of the consent judgment, correctly interpreted its terms as obli-

gating appellant to dispose of the plants in question, even though the trustee could not effect their sale at reasonable prices to persons who would operate them to manufacture CO_2 or dry ice. The terms of the decree and the background against which it was formulated show that Section IX (E)'s divestiture requirement had two purposes: first, to reduce appellant's dominant market power; and, second, to provide new competition in the important New York City and Indianapolis markets. But these two purposes, although related, are severable. Failure to secure, by sale of the plants, the contemplated additional competition is not a reason to fail to effectuate the intended divestiture and thus diminish appellant's market command.

The court's order not only reduces appellant's productive capacity in two significant market areas, but, by eliminating the competitive threat which would remain if appellant retained the plants as standby capacity, encourages new producers to enter those areas. Since it appears that the plants may be more readily salable as real estate than as going concerns, the court's order would seem no more burdensome to appellant than sale through the trustee would have been. The order therefore provides an appropriate means for carrying out appellant's basic obligation to divest the plants.

Hughes v. *United States*, 342 U. S. 353, does not require invalidation of the district court's order. In that case, this Court held that Hughes had made full compliance with the decree in accordance with

its literal terms by exercising one of two specified options accorded him. Here, however, divestiture through the court-appointed trustee was frustrated. Under such circumstances, the district court correctly construed the decree as broad enough to permit an appropriate order designed to achieve divestiture by other, but hardly burdensome, means.

ARGUMENT

The Consent Judgment Obligated Appellant to Dispose of the Two Plants, Even Though the Trustee Could Not Sell Them to Purchasers Who Intended to Operate Them For the Production of CO_2 or Dry Ice. The Order of the District Court Was an Appropriate Means For Carrying Out This Obligation.

There is no dispute that Section IX (E) of the antitrust consent judgment contemplated disposal of appellant's Long Island City and Indianapolis plants. The single issue is whether the specification of particular methods of effectuating sale of the plants requires the inference that, since those methods have failed, appellant's obligation to divest vanishes, even though there remain other available means, no more burdensome to appellant, of implementing the decree. As set forth in the Statement, Section IX (E) provided in substance that the plants should be sold as complete units, by a trustee, to a purchaser who would operate them to manufacture CO_2 and/or dry ice. As appears from these terms and from the background against which the judgment was formulated, the decree aimed not only at limiting the market power of appellant (which had achieved dominance pri-

marily by a series of acquisitions) but sought, additionally, to give first call on the plants to those who might be prepared to provide timely and effective competition. The district court so construed its decree, holding that the trustee's failure to effect sale to a prospective competitor did not discharge the overriding obligation: the duty to effect divestiture. As we shall show, that construction was a reasonable one, and the court's injunctive order was an appropriate means for carrying out appellant's divestiture obligation.

A consent judgment is not a mere private contract between the parties but is a judgment of the court. *United States* v. *Swift & Co.*, 286 U. S. 106, 115; *Pope* v. *United States*, 323 U. S. 1, 12. Here, it was that in the very fullest sense. The district judge, as he stated during the argument on the Government's motion, "participated in the conferences leading up to the consent decree * * * over a period of many, many months—* * * Many, many hours were taken in discussing it" (R. 22). The unusually active role which the judge played in the formulation of the judgment peculiarly qualified him to evaluate the intention of the parties and the purposes of the decree.[4] His position is not unlike

[4] Generally, there is little participation by district courts in the fashioning of consent judgments. "Out of approximately 109 antitrust actions which terminated in consent decrees during the ten-year period ending August 5, 1945, 79 decrees were entered within three days of the original institution of the proceeding—hardly sufficient time for any judge to subject their terms to more than cursory scrutiny." Note, *The Modification of Antitrust Decrees*, 63 Harv. L. Rev. 320, 322, n.

that of the trial judge who has made findings of fact from the vantage point, denied to appellate courts, of one who has seen and heard the witnesses. Thus, his conclusion that the understanding of the parties and the purposes of the decree were such as to require the proscription of further productive activity at the plants is entitled to great weight. Unless arbitrary or clearly erroneous, it should not be set aside.

Like any other judgment, a consent judgment must be construed as a whole in light of the "issues it was meant to decide." *Vicksburg* v. *Henson,* 231 U.S. 259, 269; *Felker* v. *Southern Trust Co.,* 264 Fed. 798 (C. A. 8), certiorari denied, 254 U. S. 633; *Hendrie* v. *Lowmaster,* 152 F. 2d 83 (C. A. 6). "[W]hatever ambiguity arises from some of its parts, its extent must be determined by what preceded it and what it was intended to execute." *Union Pacific R. R.* v. *Mason City &c. R. R.,* 222 U. S. 237, 247. The individual sections of a judgment "do not stand alone. They are to be read in connection with other paragraphs of the decree and with the allegations of the bill." *Swith & Co.* v. *United States,* 276 U. S. 311, 328.

Here, we submit, the pleadings and the judgment support the court's conclusion that there was an intention to establish a fixed obligation of divestiture. The complaint charged that appellant had embarked upon a program to eliminate competitors by acquiring their assets, and appellant admitted that it had acquired the assets of 17 companies. It further admitted that it and Pure (a co-conspira-

tor) were "the only companies in the United States having nationwide distribution of both CO_2 and dry ice." (See *supra*, pp. 3-4.) However, Pure apparently obtained its position in the national market primarily through long-term contracts, under which it tied up substantial sources of supply (see R. 8-9), rather than through acquiring competitors, as appellant had done.

The consent judgment reflects this difference in the source of the market power of the two companies. Under the judgment, Pure's dominance is to be reduced primarily by requiring it gradually to reduce its purchases from its principal supplier (Section IX(A), R. 81-82), and by prohibiting it from increasing existing, or entering into new, purchase contracts (Section IX(G), R. 85-86). But since appellant's dominance stemmed in large part from its acquisitions rather than from its supply contracts, the judgment also provided, in the case of appellant, for divestment as a necessary means of reducing appellant's power to monopolize and restrain trade. Section IX(E) obviously was designed to weaken appellant's hold on the significant New York City and Indianapolis markets [5] by compelling disposal of plants in those areas.

By requiring that the plants be sold to persons who would operate them to produce CO_2 or dry ice, the judgment served two purposes: (1) reducing

[5] As the court stated (R. 4) with respect to the Long Island City plant, "there aren't any competitors, we don't have any here in competition with the Long Island City plant, except for a plant in Belleville, I think it is, operated by Liquid now."

appellant's monopoly power; (2) providing for the operation of the plants by competitors. These two purposes, though related, are severable. When the trustee was unable to find the contemplated purchasers, the court correctly concluded that it should implement the first of the two purposes. Its order is truly the "next best result", for it prevents appellant from using the standby capacity represented by the plants as a means of discouraging in the future the competition which appellant, by its acquisitions, has suppressed in the past. To construe the judgment as permitting appellant to continue to operate these plants merely because the trustee had been unable to sell them to a competitor would, as the district court stated (R. 102), "tend to nullify a basic and integral part of the decree; it would make the divestiture provisions thereof meaningless."

Furthermore, it appears that the order imposes no real hardship upon appellant, and may even result in financial benefit. Appellant conceded (R. 15, 16) that the Long Island City plant was a "high-cost plant" which "had more value as real estate than it had to a [CO_2] purchaser." Similarly, appellant acknowledged that "the plant at Indianapolis was not a modern plant, and that it likewise would not be sold readily to a purchaser who would operate it for CO_2 purposes." The injunction results in relieving appellant of its obligation under Section IX(E)(4) to maintain the plants as going concerns pending effectuation of sale. Appellant is thus free to sell the Indianapolis plant at

such time, upon such terms, and to such purchaser as it finds advantageous. As a practical matter, therefore, appellant can now comply with the divestment requirement more advantageously than it could when it was limited to selling the plant to a category of purchasers to whom the plants "would not be sold readily."

Contrary to appellant's contention (App. Br. 15-18), this Court's holding in *Hughes* v. *United States*, 342 U. S. 353, does not require invalidation of the district court's order. In that case a consent decree required a motion picture company (R. K. O.) to transfer its production and distribution business to a newly-created company and its exhibition business to another company, and to dissolve after transferring the stock of the two new companies to its own shareholders. Hughes, who owned 24% of R. K. O.'s stock, consented to a section of the decree which required that "Hughes may 'either' (A) sell his stock in one or the other of the two newly formed companies 'or' (B) deposit such stock with a court-designated trustee under a voting trust agreement to remain in force until Hughes shall have sold his stock in one of the companies" (pp. 355-356). Hughes deposited his stock with the trustee, and some time thereafter the district court, "[w]ithout evidence or findings of fact" (p. 356), entered an order directing the trustee to sell the deposited stock should Hughes fail to dispose of it. This Court held (pp. 356-357) that the "either/or wording" gave Hughes a choice of two different alternatives, namely, selling the stock or

depositing it with the trustee, and that the decree could not be read as requiring sale of the stock if Hughes exercised the second alternative.

Thus, in the *Hughes* case, the Court held that Hughes had made full compliance with the decree in accordance with its literal terms by trusteeing the stock. Here, however, divestiture through the court-appointed trustee was frustrated, and the question is whether the decree, read in the light of all of the relevant circumstances, is broad enough to permit an appropriate order achieving that end by other means. As we have shown above, the district judge's affirmative answer to that question was a reasonable one consistent with the decree and based upon a full appreciation of its background and purposes.

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted,

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